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December 11, 1998

Magalie Roman Salas
Office of the Secretary
445 12th Street, S.W.
Federal Communications Commission
Washington, D.C. 20554

Re: Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act - Part 73 Definition and Measurement of Signals of Grade B Intensity
CS Docket No. 98-201; RM No. 9335; RM No. 9345

Dear Ms. Salas:

This letter is being submitted in accordance with FCC Rule 98-302 indicating submission of the above-identified document. A cover letter has also been forwarded to Mr. Fowler of the FCC with the diskette containing the above-referenced document pursuant to FCC requirements. Please contact the below named party if there are any questions or comments.

Respectfully submitted,

Christin McMeley
Attorney for
Superstar/Netlink Group LLC

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Satellite Delivery of Network Signals	)	CS Docket No. 98-201
to Unserved Households for	)	RM No. 9335
Purposes of the Satellite Home	)	RM No. 9345
Viewer Act	)	
	)	
Part 73 Definition and Measurement	)	
of Signals of Grade B Intensity	)	

COMMENTS OF SUPERSTAR/NETLINK GROUP, LLC

Superstar/Netlink Group, LLC ("SNG") hereby submits these Comments in response to the Commission's Notice of Proposed Rule Making ("NPRM"), issued November 17, 1998 in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

Since the time the first distant network signals were delivered by satellite to individual households via direct-to-home ("DTH") technology, the eligibility of individual consumers to

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receive those signals has been disputed.[1] The passage of and amendments to the Satellite Home Viewer Act, 17 U.S.C. § 119 ("SHVA") were ostensibly designed to resolve those disputes by incorporating an established FCC "Grade B signal strength" standard in the definition of "unserved household" in Section 119(d)(10) of SHVA in order to determine the availability of local off-air signals. Instead, that definition has spawned a series of lawsuits,[2] two petitions for rulemaking,[3] and conflicting court rulings,[4] all directed at whether a household is ineligible to receive satellite-delivered distant network signals because it is predicted to be within the FCC Grade B contour and able to receive signals off-air.

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[1] *See, e.g., Satellite Broadcasting and Communications Assoc. v. Oman*, 17 F.3d 344 (11th Cir. 1994) (Detailing the history of disputes over satellite delivered network signals preceding the passage of the Satellite Home Viewer Act).

[2] *Cannan Communications, Inc. v. Primetime 24 Joint Venture*, No. 2-96-CV-086 (N.D. Tex. filed March, 1996); *CBS, Inc. et.al, v. PrimeTime 24 Joint Venture*, No. 96-3650-CIV-NESBIT (S.D. Fla. filed March, 1996) ("*CBS v. PT24*"); *ABC, Inc. v. PrimeTime 24 Joint Venture*, Civil Action No. 1:97CV0090 (M.D.N.C. filed February, 1997) ("*ABC v. PT24*"); *PrimeTime 24 Joint Venture v. NBC, Inc., et. al*, No. 97 Civ. 3951 (S.D.N.Y. filed January, 1997); *Echostar Communications Corp., et al., v. CBS, Inc., et. al*, Civil Action No. 98-B-2285 (D. Colo. filed October, 1998); and *CBS, Inc., et al. v. EchoStar Communications Corp., et al.*, No. 98-2651-CIV-MIDDLEBROOKS (S.D. Fla. filed November, 1998).

[3] The National Rural Telecommunications Cooperative (NRTC) filed an Emergency Petition for Rulemaking on July 8, 1998, followed by EchoStar's Petition for Declaratory Ruling and/or Rulemaking, filed on August 18, 1998.

[4] *CBS v. PT24* (May 13, 1998) (District Court affirming in part and reversing in part Magistrate Judge Johnson's Report and Recommendation); *CBS v. PT24* (July 10, 1998 supplemental order granting plaintiffs' motion for preliminary injunction) ("*CBS v. PT24*, Supplemental Order"); and *ABC v. PT24*, Order, Civil Action No. 1:97CV0090 (July 16, 1998) (final order granting plaintiff's motion for permanent injunction).

One of those court rulings will cause the imminent loss of network signals to between 700,000 and one million DTH consumers.[5] The Commission now has the opportunity—indeed, the obligation—to review its "Grade B signal strength" standard to prevent the unjustified loss of network services for these satellite consumers. Unless the Commission revises its rules to accommodate the express purposes of SHVA, it is estimated that ultimately more than two million consumers, or approximately 25% of all DTH consumers, will be denied the choice of satellite-delivered network services, thereby lessening competition in the multichannel video marketplace.[6] Indeed, "the [Grade B] definition is key to whether many consumers will have real choice of programming providers."[7] But aside from the effects on competition, an even more detrimental result of the Commission's failure to specify the appropriate method for determining whether a household is "unserved," will be those consumers who will be denied access to network programming all together.

The "Grade B" issue affects consumers using Direct Broadcast Systems ("DBS") and C-band dishes alike. However, in the declining C-band market, the possible loss of network signals to more than 25% of all C-band consumers is likely to exacerbate the rate of decline

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[5] The *CBS v PT24*, Supplemental Order originally called for an October 8, 1998 "turn-off," but was extended to February 28, 1999 by an agreed Order dated September 30, 1998. One of the many reasons the parties agreed to such an extension was to give the Commission time to review and amend its Grade B regulations.

[6] Letter to Senator John McCain and Representative Tom Bliley, from Chairman William Kennard, dated September 4, 1998 ("Kennard Letter") at 2.

[7] Letter from Larry Irving, National Telecommunications and Information Administration, to Chairman William Kennard dated September 4, 1998, ("NTIA Letter") at 2.

in that market and threaten the viability of many C-band distributors' ability to continue providing network signals at all. This result would be disastrous not only to the C-band industry, but to the consumers who will effectively lose their ability to choose a programming provider or to receive network programming. To avoid such a catastrophic result, SNG urges the Commission to review its definition of Grade B and revise the predictive models and measurement standards associated with it. Even if the Commission does not change the definition of Grade B signal intensity, it needs, at a minimum, to develop or endorse a predictive model and household testing procedures for determining whether a Grade B signal is actually received off-air at the individual households based on relevant and reliable measurement standards.

II. THE COMMISSION MUST ISSUE NEW RULES THAT REASONABLY DEFINE AND PROVIDE FOR A RELIABLE MEASUREMENT OF GRADE B SIGNAL STRENGTH AT INDIVIDUAL HOUSEHOLDS

As can be seen from the lawsuits, petitions for rulemaking, inconsistent court rulings, and consumer confusion, immediate action is needed on the issues of defining, predicting, and measuring Grade B signal strength. Without the Commission's involvement, SNG, and all other DTH satellite companies, will be forced to continue to deny consumers access to network signals, regardless of whether that consumer is actually "served" by off-air signals.

A. The DTH Industry's Ability to Compete in the Multichannel Video Programming Marketplace Depends on Providing Consumers with Access to Satellite-Delivered Broadcast Television Signals Where Those Signals Cannot Be Received Off-Air

SNG is the largest distributor of C-band satellite entertainment programming in the United States, offering television programming services under the Superstar, Netlink, and Turner Vision brand names directly to over one million active C-band consumers.[8] SNG's television programming services are offered in packages, as well as on an a-la-carte basis, and include cable network services, superstations, and broadcast network services. In a declining market, SNG has been able to limit the number of its consumers who leave the C-band market, to less than half of the industry's rate of decline.[9] Over fifty percent of SNG's consumers receive at least one distant broadcast network signal from SNG, through PrimeTime 24 or Netlink International ("Netlink").

SNG, as many other C-band satellite distributors, acts as a distributor of distant network signals for both PrimeTime 24 and Netlink, offering each satellite carrier's distant

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[8] Predecessors to SNG have been providing services to the DTH market since 1987. Originally operating as Superstar Connection, the company was later known as Superstar Satellite Entertainment, and after its business combination with Netlink USA (a C-band third party packager, not to be confused with Netlink International, the satellite carrier for the Denver 6), became known as Superstar/Netlink Group. SNG's parent, United Video Satellite Group ("UVSG") also owns and operates satellite uplink facilities and distributes superstations by satellite to C-band subscribers and distributors, as well as to high powered DBS distributors, cable operators, and other multichannel video distribution technologies.

[9] The C-band subscriber count as of October 1998 is just under two million. SkyREPORT, Nov. 1998, at 3. The C-band market had been as high as 2.3 million subscribers as of the end of 1996, but has been declining steadily for the most part due to owners switching to DBS services. *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, 13 F.C.C. Rcd 1034 (1998) at ¶¶ 69-70.

broadcast network signals to "unserved" C-band consumers throughout the United States.[10] The only consumers who are eligible to receive one or more distant broadcast network signals are those who do not receive an over-the-air signal of "Grade B intensity," as defined by the FCC, of a local network affiliate.[11] Because many of SNG's customers are not able to receive an acceptable or even viewable signal (of any particular intensity or strength) from their local broadcast stations by using a conventional outdoor, rooftop receiving antenna, there is demand for the broadcast network signals SNG offers. However, the current situation with SHVA will prevent many of these customers from obtaining networks by satellite. This is because the congruence of Grade B signal intensity and viewability has not been established and all agree that reception of a Grade B signal does mean that a picture can be seen on a television set at all.

Generally, distributors of satellite-delivered broadcast networks were directed by the satellite carriers to use a careful script of questions designed for customer service representatives ("CSRs") to accurately determine whether an individual household likely received a Grade B signal of each network. Only if consumers told a CSR he or she could

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[10] Netlink's broadcast network service is packaged as the "Denver Six" which consists of ABC, CBS, NBC, Fox, PBS and independent programming from Denver, Colorado, in the Mountain time zone. PrimeTime 24 offers two complements of network signals, "PrimeTime 24 East" and "PrimeTime 24 West." Included are the major networks from East Coast and West Coast time zones.

[11] 17 U.S.C. §§ 119(a)(2)(B); 119(d)(10). Grade B signal intensities are measured in dBu (dB above one micro-volt per meter) and are set forth in 47 C.F.R. § 73.683. The manner of predicting Grade B coverage (as well as Grade A) is set forth in 47 C.F.R. § 73.684.

not watch the local network programming on their television set would the distributor authorize the consumer to receive a satellite network signal.

No one—including the broadcasters—ever proposed a better way to economically and efficiently determine eligibility for network service. No maps or other database were made available to determine if any consumer's home was inside or outside any predicted or terrain-adjusted Grade B signal contour. Moreover, as far as actually testing to determine if a Grade B signal was received, there was no established or agreed upon method to determine whether Grade B signals were received at the household, and no one to date "ha[s] offered any solution as to how to conduct meaningful intensity measurements that are cost efficient for satellite carriers."[12]

The PrimeTime 24 litigation fundamentally changed the entire methodology for determining eligibility to receive satellite delivered network signals. After the PrimeTime 24 litigation was commenced, Netlink began negotiations to establish a new screening system to be used by its network of distributors, including SNG. Since July 1, 1998, due to three separate but distinct sets of circumstances – the voluntary agreement reached between Netlink and the National Association of Broadcasters, commonly referred to as the "Red Light/Green

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[12] *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, A Report of the Register of Copyrights, U.S. Copyright Office (Aug. 1, 1997) ("Copyright Reform Report") at 127. The Copyright Office also noted that "as long as the cost of measurement exceeds the revenue of the service, there is no economic incentive to conduct the measurement." *Id.*

Light" agreement,[13] a federal court ruling in Miami, Florida,[14] and a federal court ruling in Greensboro, North Carolina[15] – SNG now must implement three different methodologies in order to continue offering and providing its customers with broadcast network signals.

While SNG has been turning away consumers who do not qualify for network services under the "Red Light/Green Light" qualification system since July, it has also disconnected several thousand consumers pursuant to the Greensboro, North Carolina order, and it is now preparing to turn off several hundreds of thousands of consumers who have been receiving network services since March 11, 1997, as will be required by the Miami

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[13] In May of this year, Netlink International and PRIMESTAR, Inc., both satellite carriers as defined under SHVA, entered into a voluntary agreement with the National Association of Broadcasters establishing a zip code based qualification system for the satellite delivery of broadcast network signals whereby each seven-digit zip code in the United States, its territories, possessions and commonwealths was to be analyzed and then coded as "red" or "green." Any zip code area completely within the predicted Grade B contour was given a "red light," and all individuals within that zip code were deemed ineligible to receive the distant network signals provided by Netlink International or PRIMESTAR. Any zip code area completely outside the predicted Grade B contour was given a "green light," and all individuals within that zip code were deemed eligible to receive distant network signals provided by Netlink International or PRIMESTAR. The zip code areas that crossed the over the predicted Grade B contours were classified as "red light" or "green light" depending on the percentage of the area lying within the Grade B contour, defining many unserved households as ineligible.

[14] *CBS v. PT24*, Supplemental Order dated July 10, 1998 (rejecting questionnaire process and ordering new regime for determining eligibility of consumers and deauthorizing ineligible consumers, which includes creating maps of predictive contours for every network broadcast station using Longley-Rice 1.2.2).

[15] *ABC v. PT24*, order dated July 14, 1998 (also rejecting questionnaire process, but ordering new qualification process whereby a consumer's eligibility is based on his or her location within a 75 mile radius from the transmitting tower).

court's ruling.[16] But, without one uniform approach that can be applied to distribution of all network services *and* that actually determines whether an individual household can receive a network signal strength of Grade B, consumers will be denied programming, threatening the viability of the satellite carriers and satellite distributors such as SNG, who provide many people with the only available television programming services. The networks' demands for the massive turn-offs will also turn consumers against the local affiliates and networks themselves.[17]

Indeed, aside from the administrative and operational complications caused by implementing these inadequate qualification systems, consumer confusion and dissatisfaction has been enormous.

> The unserved household restriction has created considerable turmoil not only between satellite carriers and broadcasters, but between consumers and the federal government. The Copyright Office has received more congressional inquiries on the eligibility of satellite subscribers for network service than any other matter in its history, and the FCC (as well as the Office) has been bombarded with literally thousands of calls and letters from irate subscribers who, for the most part, believe that federal law prevents them from obtaining network programming that they are willing to pay for and want to see.[18]

In many cases, consumers are unable to understand why, if they cannot receive their local network signals off-air with their existing equipment and antennas, they still are

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[16] *See* note 5.

[17] "Experience has shown that viewers whose service is terminated frequently become angry at their local network station and threaten never to watch the station again." *CBS v. PT24*, Plaintiffs' Motion for Imposition of Conditions on Implementation of Preliminary Injunction by PrimeTime 24 at 1.

[18] Copyright Reform Report at 116.

deprived of the network programming in the Mountain time zone provided by Netlink International, and the PrimeTime 24 network signals in the East or West Coast time zones. It is clear that in order for DTH to effectively compete with other multichannel video providers, the Grade B restrictions on eligibility must be revised and applied only to prevent satellite delivery of distant network signals where local network signals are received off-air. This is consistent with and required by SHVA.

B. The Restriction in the Satellite Copyright License on Delivering Distant Network Signals Was Intended to Exclude Only Those Consumers Who Could Actually Receive Local Network Signals Off-Air

The purpose of SHVA was to create an interim statutory license in the Copyright Act for satellite carriers to retransmit television broadcast signals of network stations to individuals for private home viewing.[19] At the time of its creation, Congress acknowledged that there were a significant number of households that were either unable to receive off-air network signals or that received off-air network signals of "unacceptable quality," and recognized the importance of providing network signals to those homes via satellite.[20] In an attempt to provide access to network stations to all consumers, Congress granted satellite carriers the authority to transmit distant network signals to "unserved households," which were defined as those households that "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of Grade B intensity (as defined by

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[19] H.R. Rep. No. 887(II), 100th Cong., 2nd Sess., at 10 (1988).

[20] *Id.* at 14.

the Federal Communications Commission) of a primary network station affiliated with that network. . . ."[21] This deceptively simple definition of "unserved household" has, however, led to endless litigation between the broadcasters and satellite carriers.[22]

In creating SHVA, Congress sought not only to provide "unserved households" access to distant network signals, but also to promote competition in the multichannel video marketplace while respecting the public interest in protecting the value of "localism" in broadcasting.[23] In other words, if a consumer could receive the broadcast networks from a local broadcast affiliate station, then SHVA served to preclude that consumer from receiving distant broadcast network signals from a DTH provider. The intent of Congress was to prevent the dilution of local viewership, resulting in loss of advertising revenues and the threat of decreased local programming due to decreased economics. Congress never, however, desired or determined that those households that did not receive the off-air broadcast networks should be denied access to distant broadcast networks altogether.

Unless the Commission adopts sensible and workable signal strength measurements and a predictive model that will permit consumers who cannot receive network signals off-air to receive distant broadcast network signals by satellite without expensive or cumbersome individual testing, as many as 9 million households – nearly one tenth of the total number of

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[21] 17 U.S.C. §§ 119(a)(2)(B); (d)(10).

[22] *See* note 1.

[23] H.R. Rep. No. 100-887 (II) at 20.

television households – will be deprived of access to satellite delivered network television programming and have no off-air alternative source for that programming. This will preference the DTH industry's competitors who can provide these consumers with network signals because none of them are burdened by the Grade B "unserved" household limitations.[24] Accordingly, reworking the Grade B standard is essential to the survival and growth of the DTH market, and absolutely necessary to achieving the goals of maximizing availability of broadcast television signals and maintaining multichannel video competition.

i. The Commission Has the Necessary Expertise and Statutory Authority to Revise Its Grade B Rules

While the basis for SHVA lies in the copyright arena and generally falls within the jurisdiction of the Copyright Office, Congress clearly intended the "unserved household" restriction to fall under the expertise of the Commission. During the recent months of debate over this issue, the Copyright Office itself has recognized that it does not have the expertise to address the "unserved household" restriction, and that for all practical purposes it is a

[24] Traditional cable television systems, open video systems ("OVS"), multichannel multipoint distribution service ("MMDS"), and satellite master antenna television ("SMATV") all have the benefit of the Section 111 license which allows for local signal retransmission and permits importation of distant network signals regardless of off-air reception of local broadcast networks. While cable and OVS do have to comply with the "must carry" rules for local broadcast networks, MMDS and SMATV are exempt from such restrictions. And now, in light of the Commission's recent declaratory ruling in favor of Entertainment Connections, Inc., interconnected non-franchised SMATV systems will likely proliferate as a result of their ability to provide local or distant network signals (at their discretion) to multiple dwelling unit residents. *Entertainment Connection, Inc.*, 13 F.C.C. Rcd 14277 (1998).

"communications regulation" to be decided by the FCC.[25] Moreover, Congress has urged the Commission to reconsider the Grade B rules and take action.[26] Indeed, the Commission has issued and revised many rules that impact the copyright liability of multichannel video providers.[27]

The Commission clearly has the authority to define a signal of Grade B intensity for purposes of SHVA, and the specific language embodied in Section 119(d)(10) shows Congress' recognition and deference to the Commission's expertise in this particular area. As outlined in Echostar's petition and the comments in support thereof, and as noted by the Commission in the NPRM, the language of Section 119(d)(10) does not reference a particular definition in existence on a particular date, nor does it incorporate language or specific values from the definition contained in Section 73.683 of the Code of Federal Regulations.[28]

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[25] Copyright Reform Report at 118.

[26] Letter to Chairman William E. Kennard from Senator John McCain and Representative Tom Bliley, July 8 1998 and Letter to Chairman William E. Kennard from Representative Rick Boucher, *et al.*, August 7, 1998.

[27] The Commission has a long history of establishing, revising, eliminating and re-instating the nonduplication protection and syndicated exclusivity rules (47 C.F.R. §§ 76.92-76.97, 76.151-76.153) which have a direct impact on copyright liability, as do its requirements for carriage of television broadcast signals, or "must carry" rules (47 C.F.R. §§ 76.51-76.70).

[28] "Indeed, if the Congress had intended to freeze in place a given administrative interpretation, it could have simply added a definition of 'Grade B intensity' into the definitions section and repeated verbatim whatever interpretation it chose from the agency's regulations or precedent." (*EchoStar petition at 9*). "When Congress incorporated Grade B into the definition of 'unserved households' it did not incorporate specific values, such as the dBu levels the Commission uses in Section 73.683. Further, nothing in the SHVA or legislative history indicates that Congress intended to freeze the value of Grade B. . . . Where Congress intended to incorporate regulations as they exists on a certain date, it has expressly

Moreover, the legislative history tends to support this analysis by referencing where the definition can "currently" be found.[29] The use of the word "currently" necessarily indicates that it may not "always" be found in the same place—that it is a definition subject to review and revision. If Congress did *not* want the Commission to amend its regulations and change the definition in SHVA, it would have indicated so, as it has in other copyright definitions.[30]

C. For Purposes of Determining Whether a Household is "Served" with the Signal of a Local Network Affiliate, There Must Be a Predictive Grade B Signal Test Designed to Predict Intensities at the Household Based on Reasonable and Appropriate Measurement Standards

The mere definition of a signal of Grade B intensity is meaningless without a way to predict or measure it. Because the Grade B signal intensity is defined by the Commission, there cannot be another more appropriate agency or legislative body to determine how to measure it and predict which households receive it. Additionally, Congress has utilized the Commission's Grade B prediction and measurement standards in the past. Therefore, it must be inferred that the Commission has the authority today to develop or endorse a model for predicting whether an individual household can receive a signal of Grade B intensity for

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done so. . . ." (*NPRM at ¶ 20*).

[29] H.R. Rep. No. 100-887(II) at 25.

[30] NPRM at ¶ 20. When Congress defined "Local Service Area of a Primary Transmitter" in the Cable Compulsory Copyright License, it incorporated specific sections of the FCC's regulations that were "in effect" on dates certain, April 15, 1976 and September 5, 1993. 17 U.S.C. § 111(f).

purposes of the SHVA, as well as the authority to adopt a method of measuring signal intensity at an individual household.

While currently there is no predictive model referenced in SHVA, in the 1994 amendments, Congress implemented Section 119(a)(8), which provided "transitional signal measurement" provisions. The purpose of these temporary provisions was to "set up a mechanism for resolving disputes, other than by litigation, over whether existing subscribers. . . are unserved within the meaning of the Act."[31] It was here that the predictive Grade B contours as defined in Section 73.684 were specifically called upon to be used as a predictive model for determining whether an individual household was "served' or "unserved." If an individual was shown to be within the predicted Grade B contour, that individual was presumed to be "served," and after a challenge by a network station, a satellite carrier was required to either (i) terminate network service to the challenged subscriber, or (ii) conduct a measurement of signal intensity at the challenged subscriber's household.[32] The implementation of 119(a)(8), however, gave rise to blanket challenges by the networks to every consumer within the predicted Grade B contour—a practice that continues today, although these interim provisions expired at the end of 1996.

Because implementation of the chosen predictive model at best allows for fifty percent of the households to receive an acceptable picture ninety percent of the time, with a

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[31] H.R. Rep. No. 103-703.

[32] 17 U.S.C. § 119(a)(8)(A).

fifty percent confidence level, the blanket challenges made by the network stations under the temporary provision of Section 119(a)(8) necessarily affected consumers that did not receive a signal of Grade B intensity.[33] The Commission itself recognized that "at the [Grade B] contour boundary, approximately half of the households cannot receive a Grade B signal."[34] But, with little or no testing because of the lack of a meaningful, accurate, and cost-effective testing procedure, satellite distributors were at the mercy of the broadcasters who challenged consumers residing within the predicted contours, and even those outside of contours but in the local market of a local affiliate.

Even though the provisions of Section 119(a)(8) were temporary and have expired, the use of the predictive Grade B contours based upon a variation of the Longley-Rice methodology has now been endorsed by a federal court in Miami.[35] If this system continues to serve as the predictive model for determining "unserved households," as many as 9 million households will be deprived of the ability to receive network signals by satellite although no

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[33] FCC NPRM fn 16 and Echostar's petition at 4.

[34] Kennard Letter at 1.

[35] *CBS, Inc. et.al, v. PrimeTime 24 Joint Venture*, No. 96-3650-CIV-NESBIT (S.D. Fla. May 13, 1998) (District Court affirming in part and reversing in part Magistrate Judge Johnson's Report and Recommendation); *CBS, Inc. et.al, v. PrimeTime 24 Joint Venture*, No. 96-3650-CIV-NESBIT (S.D. Fla. July 10, 1998) Supplemental Order Granting Plaintiffs' Motion for Preliminary Injunction.

off-air substitute exists.[36] Therefore, continued reliance on the Grade B contours, as currently set forth by the Commission, does not really resolve the problem.

Indeed, field strength contours, found in Section 73.683 of the Commission's Rules, 47 C.F.R. § 73.683, are specifically limited in their application to (1) the estimation of coverage resulting from the selection of a particular transmitter site by a TV station applicant; (2) matters relating to multiple ownership of stations; and (3) determining compliance with respect to transmitter location and antenna systems to ensure the minimum field strength is provided over the community to be served.[37] Additionally, Section 73.683(b) states that "the curves should be used with appreciation of their limitations in estimating levels of field strength . . . the actual extent of service will usually be less than indicated by these estimates due to interference from other stations."[38] Further, "[b]ecause of these factors, the predicted field strength contours give no assurance of service to any specific percentage of receiver locations within the distances indicated."[39] Not only were these limitations set forth in the "field contour" section, but they were again referenced in the "Prediction of Coverage"

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[36] NTIA's Institute for Telecommunications Sciences has analyzed Grade B contours as well as the "Longley-Rice" methodology endorsed in the *Miami PT24* litigation, and determined that as many as 9 million households would be ineligible to receive satellite-delivered programming. NTIA Letter at 2. Because the Grade B standard, as set forth *infra does* not predict picture quality or even reception with any acceptable degree of accuracy, as many as 10% of the country's television households would be rendered ineligible to receive satellite delivered network programming.

[37] 47 C.F.R. § 73.683(c).

[38] 47 C.F.R. § 73.683(b). "Over-the-air delivery of a signal of Grade B intensity does not guarantee a quality picture." Copyright Reform Report at 127.

[39] *Id.*

section.[40] With these limitations in mind, it is clear that the field contour and prediction of coverage sections were never meant to determine whether an individual could actually see the picture at the household level. Accordingly, the field strength measurements set forth in Section 73.686 were never meant to determine whether an individual desiring to purchase distant network signals from a satellite distributor was qualified to do so (i.e., "unserved").

While it is clear today that use of the predictive Grade B contours is an inadequate approach, it is possible that it was the best approach available in 1994. Since that time, however, substantial developments have been made in this area. Now, as set forth by the Satellite Broadcasting and Communications Association ("SBCA"), technology has created other alternatives that were not available four years ago.[41] The predictive model set forth in the SBCA's detailed comments does not rely on standards whereby a consumer "maybe receives" the signal, or "receives it half the time" or "maybe receives it half the time." Consumers have subscribed to satellite and other multichannel video systems in large part to obtain a greater choice of programming, but many want it to receive decent quality signals, not just some of the time, *but all of the time.*

Any predictive model that is adopted must be able to predict, with the highest and most cost efficient level of accuracy, whether *an individual household* is able to receive a signal of Grade B intensity of a primary network station, taking into account such factors as

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[40] 47 C.F.R. § 73.684(b).

[41] *See* SBCA's comments.

terrain, vegetation, land use, urbanization and clutter, and interference. Because of the impending February 28, 1999 deadline imposed by the federal court in Florida, the predictive model adopted must also have proven accuracy and be readily available to satellite distributors, such as SNG—as opposed to a system that would take time to develop and test. SNG will support a new model that will best accomplish the above objectives, and it appears the predictive model proposed by the SBCA in its comments satisfies all of these requirements.

Finally, it is important to note the Commission's concern that its "flexibility to change the Grade B intensity values is naturally constrained by the existence of the Grade A standard."[42] The Grade A standard itself only predicts intensity values at seventy percent of the locations ninety percent of the time.[43] The commission should in no way be limited by the Grade A standard, as the language of SHVA only refers to *an over-the-air signal of Grade B intensity*."[44] SHVA does not limit the Commission to the use of predictive models and measurements that only predict signal strength little more than half of the time based on measurements that have no relevance to whether or not an individual can actually see a clear picture in his or her household. Any standards or predictive models adopted should only test whether an individual actually receives an over-the-air signal of Grade B intensity that allows

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[42] NPRM at ¶ 28.

[43] *Id.*

[44] 17 U.S.C. § 119(d)(10).

for a picture that can be seen on that individual's television, and should have no relation to the Grade A predictive contour.

D. The Commission Should Adopt a Method of Measuring Grade B Signal Strength at an Individual Household for Purposes of SHVA

As noted previously, a definition of Grade B is meaningless without a way to predict or measure it. Because of the vast number of network authorizations that take place in a satellite distributor's call center every day, it is clearly not economically feasible to test the signal strength at every consumer's household. This, of course, is a fact that is uncontested by all parties involved, and is the basis for the need of an accurate predictive model. However, any predictive model used will only be that—predictive. Therefore, the Commission must establish a testing procedure that actually relates to whether an individual receives a signal of Grade B intensity *at the household level*—not above it, not around it, not near it or down the street from it.

The current (and only) methodology designated to measure a Grade B signal involves a mobile run of 100 feet and an antenna height of 30 feet.[45] This is unrealistic for purposes of SHVA. Most homes do not extend 100 feet, so an outdoor mobile run will have only accidental correlation with a set or home antenna in a fixed location and set back from the street where the run and measurements are made. Further, because the current mobile run averages a number of readings at different locations along the run, the predictive model itself

[45] 47 C.F.R. 73.686(b)(2).

likely fails to produce even a fifty percent chance of a Grade B signal at any discrete location along or near that run. More importantly, many homes do not now have rooftop antennas, let alone ones that are properly maintained and at a 30 foot height. If an antenna is below 30 feet, it is considerably less likely that it will receive an acceptable off-air picture even if the signal strength at 30 feet in the street is of Grade B intensity.[46]

Accordingly, in the real world where the Commission will have to determine whether it is unfairly denying access to satellite delivered signals, it will necessarily have to take into account the fact that many homes do not have 30 foot antennas, and that Grade B signal strength at that height does not mean any signal of any particular strength is received at a lower antenna height or is in fact viewable. NTIA's calculations and estimation of the strict application of the Grade B standard explains why there has been such a consumer outcry; obviously many homes that are in areas where a Grade B signal is theoretically available over a well maintained and positioned 30 foot high antenna, have no such viewable signal on their sets.[47] But, unless a household has a viewable picture of a network, there is no reason to deny that household access to a distant network signal delivered by a satellite carrier.

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[46] "[A]t levels below the 30 foot height, signals are subject to additional shadowing by terrain, trees, and structures that make it extremely difficult to specify a lower antenna height with compensating adjustments to the signal strength level." *In the Matter of Amendments of Part 1, 73 and 76,* 3 F.C.C. Rcd 2617, 2619 (1988).

[47] NTIA Letter.

Given the known imperfections of the measurement standards found at 47 C.F.R. § 73.686, it is incumbent upon the Commission to refine the Grade B measurement standard to make sure that signals are not just "theoretically" available thirty feet above the ground somewhere near the household, but available and viewable *in* the households that will be unable to get those signals by satellite. Accordingly, SNG urges the Commission to adopt a test that takes actual signal strength measurements (not an average), at the household (not in the street), with the use of a standard rooftop antenna (not at a 30-foot height), and that takes into account signal attenuation due to line loss and the number of splitters utilized in the household.

III. CONCLUSION

It would be an injustice to consumers across the United States who do not have access to over-the-air network signals to continue to use the existing Grade B contours as the predictive model for determining whether such consumers are "unserved." However, the worst case scenario would be for the Commission to remain silent on this issue, leaving the satellite industry subject to multiple interpretations of "unserved household" from multiple sources, and allow millions of truly eligible households to be denied the benefits of satellite delivered network programming. The Commission should adopt a new and economic method for predicting reception of signals of Grade B strength at the household level that will permit consumers to exercise choice of multichannel video providers unconstrained by unreasonable and unintended restrictions on eligibility to receive satellite-delivered broadcast television network programming.

Respectfully submitted,

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